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Nos. 07-1428 & 08-328

In The
Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS BRIEF OF THE CONCERNED AMERICAN FIREFIGHTERS ASSOCIATION, PHILADELPHIA CHAPTER, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

The municipal employer violated the Equal Protection Clause by nullifying the examination results because of race 4

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 5, 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 5, 10

Grutter v. Bollinger, 539 U.S. 306 (2003) 7, 8

Lomack v. City of Newark, 463 F.3d 303 (CA3 2006) 6, 7, 9, 10, 11

Parents Involved In Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) 12

Patrolmen's Benevolent Ass'n v. New York, 310 F.3d 43 (CA2 2002) 8, 9

Petit v. City of Chicago, 352 F.3d 1111 (CA7 2004) 9

Ricci v. DeStefano, 530 F.3d 87 (CA2 2008) 4, 5, 11

Ricci v. DeStefano, 530 F.3d 88 (CA2 2008)..... 4, 5, 11

Ricci v. DeStefano, 554 F.Supp.2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (CA2 2008).....6, 11

United States v. Paradise, 480 U.S. 149 (1987).....7

CONSTITUTIONAL PROVISION AND STATUTE

42 U.S.C. §§ 2000e *et seq.* 3, n.2

U.S. Const. Amend. XIV § 1 .....2, 3, 4, 12

BRIEF *AMICUS CURIAE* OF THE CONCERNED AMERICAN FIREFIGHTERS ASSOCIATION, PHILADELPHIA CHAPTER, IN SUPPORT OF PETITIONERS.

Concerned American Firefighters Association, Philadelphia Chapter ("CAFFA – Philadelphia"), submits this brief as *amicus curiae* and respectfully requests that the United States Court of Appeals for the Second Circuit decision be reversed.

INTEREST OF *AMICUS*[1]

CAFFA – Philadelphia members are all firefighters in the City of Philadelphia. It has approximately nine-hundred members. As set forth on the organization's website (http://www.caffaphilly.com), the purpose of CAFFA – Philadelphia is the following:

> The object of this Club shall be to promote the social, educational, and civic interest of the Concerned American Fire Fighters Association and their families. And to act as a "watch dog" to protect the rights of all

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than CAFFA – Philadelphia, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; petitioner and respondent have submitted letters of blanket consent to the Clerk of the Court.

American Fire Fighters regardless of race or gender.

Moreover, CAFFA – Philadelphia's policy objectives are described in the following way:

- Fair Hiring and Promotional Practices for ALL Firefighters & Paramedics.
- The Elimination of Race Based Quotas in the Fire Service.
- Rank Order Hiring and Promoting.
- Reduce the Weight of or Eliminate Oral Examinations completely.

Like the New Haven Fire Department, hiring and promotions in the City of Philadelphia Fire Department take place under civil-service rules and regulations. Because of its experience with problems of the political manipulation of race comparable to what appears in this case, CAFFA – Philadelphia fully endorses the remedy of color-blindness in civil-service promotions sought by petitioners. The Equal Protection Clause of the Fourteenth Amendment has clear application to the troubling use of race in this case, and CAFFA – Philadelphia maintains that the racial classification employed here is constitutionally impermissible.

SUMMARY OF ARGUMENT

CAFFA – Philadelphia contends that the New Haven Civil Service Board's ("CSB") refusal to certify

the results of promotional examinations for the positions of lieutenant and captain in the New Haven Fire Department is an unequivocal violation of the equal protection of the laws guaranteed by the Fourteenth Amendment.[2] (CAFFA – Philadelphia shall rely on the facts set forth in the brief of petitioners.)

The Fourteenth Amendment of the United States Constitution requires in relevant part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Under this constitutional requirement, the United States Supreme Court has required that all racial classifications receive strict scrutiny. In this case, the District Court and the United States Court of Appeals for the Second Circuit declined to confront the fact that a racial classification was used by the CSB, and therefore its failure to apply strict scrutiny was manifestly in error.

As a result of this failure to acknowledge the use of race, the District Court granted and the Court of Appeals for the Second Circuit affirmed summary judgment dismissing all the claims of the parties who excelled on the promotional examinations, which were subsequently nullified by CSB for failure of the results to satisfy the appropriate racial composition for promotions. The District Court also failed to

[2] CAFFA – Philadelphia does not advance any arguments in this brief involving Title VII, but it joins in the arguments of petitioner with respect to the issues presented under this statute.

recognize the political shenanigans underlying the manipulation of race in New Haven's civil-service system.

This Court's equal-protection jurisprudence has embraced a robust skepticism with respect to all racial classifications. CAFFA – Philadelphia maintains that this case provides the Court with another excellent opportunity to eradicate as constitutionally impermissible the use of race in the promotion of firefighters and to buttress the principle of equality before the law.

ARGUMENT

The municipal employer violated the Equal Protection Clause by nullifying the examination results because of race.

The questions presented under the Fourteenth Amendment's Equal Protection Clause were framed below with precision by Judge Jose Cabranes thus: "Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that 'too many' applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a practice constitute an unconstitutional racial quota or set-aside?" *Ricci v. DeStefano*, 530 F.3d 88, 94 (CA2 2008) (Cabranes, J., dissenting). Contrary to the determinations of both of the lower courts in this case, the Equal Protection Clause, when

applied, does in fact prohibit the race-based nullification of the examination results by the CSB.

The decisional law in this area is very well established and not beclouded with ambiguity. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), the Court unambiguously determined that *all* racial classifications used by government require strict scrutiny. That is, the governmental entity must proffer a compelling interest to support the use of any racial classification, and the means to effectuate that compelling interest must be narrowly tailored. *See also Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

Moreover, under the highest level of scrutiny, the only rationale that will survive is the rectification of past racial discrimination. As Judge Cabranes succinctly noted: "*Croson* and *Adarand* establish that racial quotas are impermissible under the Constitution absent specific findings of past discriminations that are not in the record here." *Ricci*, 530 F.3d, at 98 (Cabranes, J., dissenting).

In this case, the promotional examinations, which were fairly administered and scored, had results that were rejected by the CSB *because of the race of the successful examinees*. The District Court in

this case concluded that "plaintiffs cannot show that defendants acted out of intentionally discriminatory purpose." *Ricci v. DeStefano*, 554 F.Supp.2d 142, 161 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (CA2 2008). Despite the fact that it is impossible to discern any other purpose, the District Court continued:

> Rather, they acted based on the following concerns: That the test had a statistically adverse impact on African-Americans and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

Ricci, 554 F.Supp.2d, at 162. Even assuming the sincerity of these concerns, *nothing* in this list of motivations constitutionally justifies the use of race to disregard the results of the promotional examinations in this case.

Of particular relevance to this dispute is *Lomack v. City of Newark*, 463 F.3d 303 (CA3 2006), in which the race-based transfer and assignment policy in the City of Newark fire companies was successfully challenged under the Equal Protection Clause. The Third Circuit concluded that without evidence of past intentional discrimination by a governmental agency, the use of racial classifications does not satisfy strict

scrutiny and is therefore not permitted under the Equal Protection Clause.

The court properly acknowledged that a government has a compelling interest in limiting its own past discrimination. *United States v. Paradise*, 480 U.S. 149, 167 (1987). That was not at issue in *Lomack*, nor is it at issue in this case. Instead, the *Lomack* court was required to confront the diversity rationale advanced by the City of Newark to justify what can be characterized as the aesthetic use of an express racial classification. This argument was carefully analyzed and then emphatically rejected.

The court reasoned in a way directly relevant to the concern with diversity in the instant case. It considered the constitutional validity of the diversity rationale in the context of higher education established in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and then distinguished that understanding from the very different context of firefighting:

> The "relevant difference" . . . between a law school and a fire department is their respective missions. The mission of a school is to educate students, "prepar[e] students for work and citizenship," and cultivate future leaders. The *Grutter* Court found, based on extensive testimony and other evidence, that a "critical mass" of diverse students was necessary for the University of Michigan Law School to effectively achieve the mission. But *Grutter* does not stand for the proposition that the educational benefits of diversity are

always a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.

The Fire Department's mission is not to educate. Its mission is "the control, fighting and extinguishment of any conflagration which occurs within the city limits." Newark, N.J. General Ordinances v. I, tit. II, ch. 21, § 1.2 (2005). Accordingly, *Grutter*'s holding regarding a compelling interest in the educational benefits of diversity is unavailing here. And, we note, the City does not argue that diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department's mission of fighting fires, *i.e.,* that the Department has an operational need for diverse fire companies [footnote omitted], and we do not read the City's assertions of increased "camaraderie," "acceptance," and "tolerance" as making such an argument. Even if we were to liberally construe those assertions as an operational needs argument, however utterly no evidence supports it. *See Patrolmen's Benevolent Ass'n,* 310 F.3d at 52-53 (citations omitted) ("[C]ourts recognizing the [operational needs] defense have required the government actor to demonstrate that it is 'motivated by a truly powerful and worthy concern and that the racial measure . . . adopted is a plainly apt response to that concern.' The justification must be substantiated by objective evidence. . . .").

Lomack, 463 F.3d, at 309-310 (emphasis in original; certain internal citations omitted).

As suggested by this *Lomack* extract, a case for race-based hiring has been made successfully in some circuits with the "operational needs" argument in the discrete area of law enforcement. The *Lomack* court adverts to this argument:

> Courts have found such "operational needs" arguments to be persuasive in the law enforcement context. *See, e.g., Petit v. City of Chicago,* 352 F.3d 1111, 1114 (7th Cir. 2004) (finding a "compelling operational need for a diverse police department" in a "racially and ethnically divided major American city"); *Patrolmen's Benevolent Ass'n v. New York,* 310 F.3d 43, 52 (2d Cir. 2002) ("We have recognized that 'a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,' may constitute a compelling state interest.").

Lomack, 463 F.3d, at 310, n.8.

A firefighter's mission, however, is much different from that of a police officer in that the task is not the often intense involvement in the day-to-day affairs, criminal or otherwise, of a community generally but is concentrated on fighting fires. Whereas police officers embody the force of the law throughout the community, firefighters are assigned the critical but tightly focused responsibility of protecting the public

from fire. The race of the firefighter is an utter irrelevance under these circumstances. With respect to the indispensable general proposition of racial neutrality, one Member of this Court has piquantly said, "When we depart from this American principle [of racial neutrality] we play with fire and much more than the occasional [party to a lawsuit] burns." *Croson*, 488 U.S., at 527 (Scalia, J., concurring). The use of race in the promotion of firefighters is irresponsible in its sacrifice of professional competence to the political preoccupation with racial diversity. And it is irrelevant in the firefighting context. Indeed, much more than a party to a lawsuit will be put in jeopardy by such a cavalier approach.

Lomack is also illustrative of another problem that is lurking in the instant case – namely, the dangerous possibility of political manipulation of race that is available when constitutional clarity is absent. In *Lomack,* the court depicted the political background as follows:

> On July 1, 2002, Sharpe James, newly re-elected as Mayor of Newark, New Jersey, issued a "mandate" in his inaugural speech that, "improve morale," all single-raced fire companies in the Newark Fire Department would be eliminated. [Footnote omitted.] The racial composition of each of the 108 fire companies was thereafter examined, and dozens of firefighters were involuntarily transferred to different companies solely on the basis of their race. In January 2004,

> Mayor James announced that "[w]e have created a rainbow at each fire house" [citation omitted].

Lomack, 463 F.3d, at 305.

Like *Lomack*, this case has a disturbing political subtext. The Reverend Boise Kimber is described by the District Court as "a vocal African-American minister who . . . is a political supporter and vote-getter for Mayor DeStefano." Rev. Kimber and others urged that the results of the promotional examinations be rejected. They were a central part of an informal group "whose priority was increasing racial diversity in the ranks of the Fire Department." *Ricci*, 554 F.Supp.2d, at 150. With race available as a potent instrument to interfere with a race-neutral civil-service system, the inevitable result is unfairness to innocent parties who have demonstrated competence and are seeking, at considerable cost to themselves with respect to time and money, advancement in their jobs. It is this race-based inequity that the Equal Protection Clause is designed to vanquish.

To employ Judge Cabranes's formulation: this "case presents a straight forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?" *Ricci*, 530 F.3d, at 93-94 (Cabranes, J., dissenting).

The two lower courts reached an erroneous answer to this question because the Court did not apply the rigorous scrutiny required for a patent racial classification. This failure to identify the unconstitutional use of race is at the heart of this case.

The remedy under the Equal Protection Clause in this matter is the simple remedy available for all racial discrimination: the cessation of racial discrimination. As the Court has trenchantly observed, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved In Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2768 (2007). The Court is presented here with an excellent opportunity to extirpate the use of race as a factor in all promotions in fire departments throughout the nation.

CONCLUSION

To vindicate the laudable objective, warranted by both text and history, of color-blindness under the Equal Protection Clause, the decision in this case ought to advance this proposition: To get beyond race in the context of civil-service promotions in fire departments, this Court must require that, as a matter of constitutional imperative, race is beyond the pale. The Fourteenth Amendment requires nothing less than this color-blindness. "In the eyes of government, we are just one race here. It is American." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring).

For the foregoing reasons, CAFFA – Philadelphia requests that this Court reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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